# CONSTITUTIONALITY OF TEACHERS' PENSIONS LEGISLATION.

## II. The Validity of the Proposed Michigan Law.[a]

IN the preceding paper,[b] we considered pension legislation in general,—its extent, forms, purpose, and relation to the taxing power of the state and nation. It is proposed in this paper to discuss in detail the provisions of the proposed Michigan teachers' pension law in the light of the general principles set forth in the former paper, with reference to specific constitutional provisions, and the decisions of the courts upon the validity of pensions for firemen and policemen which are similar in many respects to teachers' pension systems, together with such decisions as have been made concerning the constitutionality of particular teachers' pension laws.

As we saw in the former paper, taxes can be levied only for a public purpose, determined by the courts, guided by the course of history, legislation, custom, equity, and the demands of the public welfare,—not limited to mere necessities of government, but embracing things tending to subserve or advance the well-being of the whole society, including pecuniary inducements for the faithful performance of public duties. Taxes for such purposes are valid, unless clearly violating some specific constitutional provision, construed with reference not only to conditions existing at the time of making it, but also with reference to problems likely to arise from changing future conditions. By history, custom, constitutions, legislation, and decisions, the whole subject of public education, with all that pertains thereto, is a matter of the highest public interest to be advanced by legislation as the public welfare may demand. So, too, by history, custom, equity, and legislation a pension system has been found to be among the best methods of securing and advancing in various lines of governmental action, the most faithful and effi-

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[a] The proposed law reviewed herein was pending in the Michigan Legislature at the time this and the preceding paper were prepared, for the use of the teachers in urging the passage of the bill. This paper, prepared before the opinions referred to below were given, has been rearranged to some extent but not otherwise changed. The Attorney General, the Honorable Grant Fellows, gave an opinion that the proposed law was unconstitutional because the proposed contribution by the State would require taxation for private purposes, the required contributions by the teachers would take their property without due process of law, and would interfere with the teachers' right to contract,—relying mainly on the Missouri and Ohio cases reviewed herein. The Hon. Benton Hanchett gave an opinion that the proposed law was constitutional. The House passed the bill with a referendum clause; the Senate passed it without the referendum. The House would not recede and the bill failed.

[b] Mich. L. Rev., May, 1913, p. 451.

cient public service, and justifies taxation therefor unless constitutional provisions expressly and unequivocally forbid.

The title of the proposed Michigan law is:

"A bill to provide for retirement salaries for teachers in certain cases, and to provide means to pay the same."

The Constitution of Michigan, as do most of the state constitutions, provides that "no law shall embrace more than one object, which shall be expressed in its title."[1]

This title is sufficient to cover the other provisions of the bill,—definitions,—establishment of retirement fund,—board to administer the fund,—officers,—powers of board,—rules,—contributions of teachers,—duties of school boards,—penalties,—terms of retirement of teachers,—payment of annuities, and refund of contributions. All these are germane to the subject which is single, according to the decisions of our Supreme Court.[2] Under the title "An Act to establish a thorough and efficient system of free public schools and to provide for the maintenance, support and management thereof," a teachers' pension system similar to the one under discussion may be established without violating such a constitutional provision.[3] So too, the title "An Act to Incorporate the Firemen's Benevolent Association, and other purposes," is sufficient to justify a tax on fire insurance companies to raise the funds necessary to pension firemen.[3a]

The bill continues:

"The People of the State of Michigan enact: Section I. *Definitions.* The term *teacher* as used in this act shall include all persons employed in teaching by any city board of education, or school board or other managing body of any city, town, village or rural school district in this State and all superintendents and assistant superintendents of said schools, all supervisors of instruction, all principals and assistant principals, and special teachers of said schools. It shall include county school commissioners, county normal teachers, the state superintendent of public instruction and his deputy."

"The words 'retirement fund' as used in this act shall mean the Michigan State teachers' retirement fund for public school teachers as established by this act."

This section includes two classes of persons: *teachers,* who are *employees,* and not public officers; and school commissioners and

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[1] Const. Mich. (1909) Art. V, § 21.

[2] McMorran v. Great Hive of Maccabees, 117 Mich. 398; Atty. Gen'l v. Joy, 55 Mich. 94; Jackson Traction Co. v. Commr. of R. R.'s, 128 Mich. 164; Atty. Gen'l v. Lowrey, 131 Mich. 639, 199 U. S. 233, 26 S. Ct. 27.

[3] Allen v. Board of Education (1911), 81 N. J. 135, 79 Atl. 101; Lyons v. Police Pension Board, 255 Ill. 139, 99 N. E. 337. See also Notes Ann. Cas. 1912 A. p. 102, and 1912 D. p. 157.

[3a] Firemens' Benev. Assn. v. Lounsbury (1859), 21 Ill. 511, 74 Am. D. 115. See also Pennie v. Reis (1889), 80 Cal. 266.

the State Superintendent of public instruction, who are elective public officers, holding for definite terms at salaries fixed by law.[4]

The teacher is an employee under contract,[5] which is protected by the state and federal constitutional provision that "no law shall be passed impairing the obligation of contracts."[6] Public offices however are not created by grant or contract, but are revocable at the will of the legislature, unless constitutions forbid.[7] Most state constitutions provide as does the Constitution of Michigan that "Salaries of public officers shall not be increased or decreased after election or appointment."[8] Whether the contributions to the retirement fund required by Section VIII (*infra*), is a breach of the teachers' contract, or a decrease of the officers' salary, or whether the annuity paid under Section X, is extra compensation, or an increase of salary, is considered in discussing those sections.

"Section II. *Establishment of State Teachers' Retirement Fund.* There is hereby established the Michigan State teachers' retirement fund for public school teachers which shall consist of:

1. All contributions made by teachers as hereinafter provided.
2. All donations, legacies, gifts and bequests which shall be made to establish a permanent fund.
3. The income of interest derived from the investment of the moneys contained in the said permanent fund.
4. In case the amount of said fund, not including the principal of the permanent fund, is at any time insufficient to carry out the provisions of this act, there is hereby appropriated out of the general fund in the State treasury such additional sum or sums as may be necessary to pay the retirement *salaries* and expenses herein provided for. The auditor general shall add to and incorporate in the state tax for the year 1913 and every year thereafter a sufficient amount to reimburse the general fund for the amounts appropriated by this act."

Subdivision (1) of this section will be considered under Section VIII, below. There can be no doubt about the validity of subdivisions (2) and (3). The State may receive and accept donations for such purposes, and place them at interest according to the directions of the donor, as was done with donations by Japanese Embassadors to the police department of New York City.[9]

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[4] Commissioners are elected for 2 years, term begins July 1, and their salaries are fixed by County Supervisors, C. L. 1897, §§ 4809-17. State Superintendent of Public Instruction is elected in April for 2 years, term begins July 1, and salary is fixed by the State Legislature, $4,000 per year, P. A. 1909, p. 15.

[5] Murphy v. Board of Ed. (1903), 84 N. Y. S. 380; Steinson v. Board of Education, 165 N. Y. 431; Ball v. Trustees, 71 N. J. L. 64; School Dist. v. Gage, 39 Mich. 484, 33 Am. R. 421; Allen v. Board of Education (1911), 81 N. J. L. 135, 79 Atl. 101.

[6] Const. Mich. Art. II, § 9. U. S. Const., Art. I, § 10.

[7] Atty. Gen'l v. Jochim, 99 Mich. 358, 41 Am. St. R. 606; State v. Hocker (1897), 39 Fla. 477, 63 Am. St. R. 174; State v. Sargent, 145 Ia. 298, 139 Am. St. R. 439; State v. Rhame (S. C. 1912), 75 S. E. 881.

[8] Const. Mich., Art. XVI, § 3.

[9] Peel v. Board of Met. Police (1865), 44 Barb. 91; Dikes v. Miller (1860), 25 Tex. Supp. 281, 78 Am. D. 571; State v. Blake (1897), 69 Conn. 64, 36 Atl. 1019.

The validity of subdivision (4), providing for the appropriation of public money to make up any deficit in the funds necessary to pay the retirement salaries provided in Section X, and requiring the sums so used to be raised by taxation is the crucial question here. Section X provides that a sum not less than $240 nor more than $500 per year shall be paid during the remainder of their lives to teachers who have retired after thirty years of teaching, and to others who have not taught so long, certain proportionately smaller sums. It will be noted that this applies only to those who are in the service after the law takes effect (a matter discussed below); but is not based upon any disability or injury received while in the service, nor is payment limited to those in needy circumstances.

Four principal objections urged against these provisions are: (a) The tax is not for a *public* purpose; (b) violates "due process" and "equal protection" provisions of State and Federal constitutions; (c) grants the *credit* of the state to persons; or (d) gives *extra compensation* after service is performed. These will be considered in order.

(a) Is the purpose, *"to provide retirement salaries"* for teachers under the conditions stated,—a public purpose? The term "salary" is generally applied to payments for services to be rendered, and not to payments to be made after the obligation to render services is terminated,—which is more properly called a pension; the payments to be made under the provisions of this law partake of the nature of both salary and pension, in that the payments are continued after the obligation to render services is terminated, but nevertheless are part of the compensation stipulated to be paid for engaging or continuing in the service,—payment only being deferred until after the service is terminated. It is therefore not inappropriate to call such a "retirement salary," any more than it would be to designate it a "pension." In fact West Virginia, not having a teachers' pension system, in 1907 in creating the Parkersburg Independent School District provided that teachers who had taught 30 years or more should be put on the substitute or reserved list of teachers at three-fourths pay, subject to call into the service at any time,—and in this way are retained on a salary.[10] The difference between such a plan, and the one under discussion, is that payment of part of the salary bargained for while in the service, is deferred until after the service, and the obligation to render service, are terminated. Such could properly be designated *"deferred* salary." The validity of the payment however will depend not upon the name but upon the substance of the transaction. Are such payments for a public purpose?

[10] Squier, Old Age Dependency in U. S. (1912), p. 181.

They certainly are so under all the principles applied under the Federal laws and decisions to pensions for military, naval, and hospital service, and retirement pay to judges, officers and marines. They certainly are so under the principles of the state bounty cases, state provisions for old soldiers' homes, and state payments to old soldiers under the Massachusetts decisions, state pensions to confederate soldiers, referred to in former paper,[11] and are also within the dictum of Judge Cooley, that such are valid if they are designed to benefit the public by being "an inducement to the faithful performance of a public duty in a responsible position,"[12] or if "it will encourage them to render better service,"[13] or "if there is the least probability of promoting the public welfare,"[14] or "if it can fairly be thought the public good will be served by the grant of such (even unstipulated) reward," whether "for civil or military service."[15]

That provision for such a retirement fund, or to pay such retirement salaries, partly by taxation, is a public purpose is made equally clear by the history of Firemens' and Police pension funds, derived from public revenue.

Firemen are public employees[16] of the cities which they serve, and are paid salaries similar to *teachers*. Policemen on the other hand are usually classed as public officers;[17] so these two stand in positions similar to teachers and the Superintendent of Public Instruction under the proposed act.

When Stuyvesant was director general of New Netherland a penalty was imposed on the owner of every chimney found to be insufficiently swept; the sum so derived was applied to buy buckets, ladders, etc. for use in putting out fires by the citizens; in 1731 two fire engines were bought; these were also used by citizens; in 1737 the city asked to be authorized to appoint 24 firemen to run the engines, and to be exempt from constable and militia duty; this

[11] See May No., 1913, pp. 465, 470, 473, 475; U. S. v. Hall, 98 U. S. 343, 346; Cole v. U. S. 34 Ct. of Cl. 446; Broadhead v. Milwaukee, 19 Wis. 624; Thompson v. Inhab. of Pittston, 59 Me. 545; Booth v. Woodbury, 32 Conn. 118; Opinion of Justices (1912), 211 Mass. 608, 98 N. E. 338; Elder v. Collier (1897), 100 Ga. 342; Bosworth v. Harp, — Ky. —, 157 S. W. 1084.

[12] In People v. Salem Twp. (1870), 20 Mich. 452, 486.

[13] Thompson v. Inhab. of Pittston (1871), 59 Me. 545.

[14] Booth v. Woodbury (1864), 32 Conn. 118.

[15] Opinions of Justices (1900), 175 Mass. 599, 602, 49 L. R. A. 564; Moffatt v. O'Donnell, — Mass. —, 102 N. E. 344.

[16] Sandwich v. Krake (1896), 66 Minn. 110, 61 Am. St. R. 395; Trustees of Exempt Firemens' Fund v. Roome (1883), 93 N. Y. 313, 45 Am. Rep. 217, on 220; Gillespie v. City of Lincoln, 35 Neb. 34, 16 L. R. A. 349; Cunningham v. Seattle, 40 Wash. 59, 4 L. R. A. (N. S.) 629; Brown v. Dist. Col. 29 App. D. C. 273, 25 L. R. A. (N. S.) 98; State v. City of Anaconda (1910), 41 Mont. 577, 111 Pac. 345.

[17] Monette v. State (1907) 91 Miss. 662, 124 Am. St. R. 715; Brown v. Russell, 161 Mass. 14, 55 Am. St. R. 357.

was done, and the common council appointed the "first fire company" charged with the public duty of extinguishing fires, but whose compensation consisted only in the *exemptions* granted; while the work was light, the dangers were obvious, and there were soon left men maimed and crippled, and widows and orphans prematurely deprived of their natural protectors; in 1792 the firemen undertook to establish a fund for their relief, and the "chimney fire money,"—public money,—was devoted to this; to do this more efficiently, the firemen were incorporated; in 1816 the legislature extended the *exemptions* for life after 10 years of honorable service, and in 1829, after five years of such service; the fund became inadequate by 1849, when the legislature directed that two per cent of the gross premiums received by agents of foreign insurance companies in any city (which by the act of 1837 had before been made payable to the state for the privilege of doing business in the state) should be paid to the fire department of the city, and in New York City to the existing corporation of firemen in that city. This act was immediately attacked as unconstitutional, on two grounds,—that it was a taking of property not for a *public*, but for a *private* purpose, that is taxing or taking the property of one private corporation for the benefit of another, and also deprived foreign corporations of the privileges and immunities of citizens, contrary to the Federal constitution. In *Fire Department* v. *Noble*[18] both these contentions were ruled against the insurance companies. The court said: "The laying of a tax or requiring a license fee to be paid can never be considered as taking private property in the sense of the constitution. . . . It has always been conceded that the legislature has the power to apply moneys raised, either by tax or otherwise to purposes of charity. The plaintiffs are the representatives of a public charity well worthy of support. . . . If the tax may be imposed for the benefit of the department, I see no reason why it may not be payable at once to them instead of passing through the state treasury for that purpose."

After this decision, another case,[19] involving the same points, was decided the same way; the opinions of five leading lawyers of the country were obtained,[20] and the matter was then taken to the Court of Appeals, which unanimously affirmed the decision of the Court below. Four of the five lawyers whose opinions were asked held the law invalid,—three of them[21] because it deprived the foreign

[18] 3 E. D. Smith (N. Y. 1854), 440.

[19] Fire Department v. Wright (1854), 3 E. D. Smith 453, (see Notes, 440, 458).

[20] Daniel Webster, Samuel Jones, and George Wood of New York; Judge Mark Skinner of Illinois, and Wm. L. Dayton of New Jersey.

[21] Webster, Jones and Wood.

insurance companies of their privileges and immunities under the Federal constitution. Judge SKINNER held that it took "the private property of one person and gave it to another private person, for his private use," and this was not within the power of taxation by the legislature.[22] Mr. DAYTON held the law did not violate the Federal constitution.[23] The attorneys argued fully the proposition that the tax, being for the support of the Fire Department (a private corporation) to provide pensions for disabled firemen, was for a *private* and not a public purpose, and the court ruled against this contention.

The act under discussion in these cases was amended in 1857, and re-enacted, and its substantial provisions remained unchanged down to 1883, when they again came before the Court of Appeals.[24] At that time the volunteer fire department had been replaced in 1865 by a paid organization, called the Metropolitan Fire Department, using steam apparatus and new appliances; this resulted in the discharge of many firemen, but their life exemptions were preserved to them; and because of this great increase in the number of *exempts,* the benevolent fund was imperiled; to preserve this a new corporation called the Trustees of the Exempt Firemen's Benevolent Fund was created, and to it was continued for 5 years at first, then 7 years more, and then, in 1877, 9 years more, or 21 years in all, the right to receive the insurance tax, although the exempt firemen were not in the service after they were displaced by the paid service in 1865. In 1875 the constitution was amended by providing "the money of the state" shall not be given "to or in aid of any association, corporation or private undertaking," and it was claimed that the act of 1877, continuing this gift for 9 years more, violated this provision, and "however the payment might be construed while the firemen were a public body and doing a public duty, the appropriation became purely a gift when made after the service ended, and when there was no legal or equitable obligation upon the State." The court by FINCH, J., says: "The State, in continuing the appropriation to the firemen when their services were no longer required, recognized an honorable obligation founded upon their past services and the injuries and suffering which those had occasioned . . . That which would have been merely a charity or a gift is not such by reason of the service given, the consideration rendered, the honorable obligation incurred. . . . When the State takes from the

[22] Judge Skinner's Opinion, on p. 473. This should be compared with the Illinois case, Firemens' Ass'n v. Lounsbury, 21 Ill. 511, given below.

[23] Opinion given on p .486, and also in Tatem v. Wright, 1 Zabr. N. J. 429.

[24] Trustees of Exempt Firemens' Fund v. Roome (1883), 93 N. Y. 313, 45 Am. Rep. 217. The case was argued by Joseph H. Choate and James C. Carter.

public treasury a sum of money and gives it to a corporate body for the relief of deserving beneficiaries it does one of two things. It either bestows a charity, or recognizes and discharges an obligation due it to the recipients. The former it cannot do except in specified cases. The latter it may always do, for the constitutional provision was not intended and should not be construed to make impossible the performance of an honorable obligation founded upon a public service, invited by the State, adopted as its agency for doing its work, and induced by exemptions and rewards which good faith and justice require should last so long as the occasion demands."[25] The court says also: "It seems to us equally plain that the tax thus made payable was in no just sense, a gift of public money or a charity on the part of the State. It was an appropriation of the tax to a proper governmental and public purpose, and was received not on the ground of poverty or as alms, but as fairly and fully earned and justly paid."[26] This tax law is still substantially in force and valid, and does not violate the Fourteenth Amendment,[27] and ten per cent of the amount so received (except in New York City) shall be paid toward the support and maintenance of the Volunteer Firemens' Home at Hudson, New York.[27a]

In 1852 the Firemen's Benevolent Association of Chicago was incorporated by act of the legislature of Illinois, which provided that 2% of the fire insurance premiums written in Chicago should be paid by the agents of the companies doing business there, to this corporation, to be used for the relief of the distressed, sick or disabled members of the firemen's association. One objection was that "here a revenue is attempted to be raised, not for state purposes, nor yet to meet any public exigency or want, but merely for the benefit of a private charity." The court held that since "all legislative power" was conferred upon the legislature, and "whenever it is alleged that the legislature has transcended its powers," it is necessary "to point out some restriction or limitation which has been disregarded," and here "it is not pretended that there is any express provision in the constitution inhibiting the legislature," it has power to impose such burden, and "to divert this fund to the direct endowment of this charity," and it is not necessary that it "should be paid

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[25] pp. 326, 327.

[26] p. 323.

[27] Fire Deparment v. Stanton (1899), 159 N. Y. 225; Birdseye's Rev. Stat. and Gen'l Laws, N. Y., Vol. II, p. 1868; Consol. Laws 1909, c. 28; Ramsay v. Hayes (1907), 187 N. Y. 367, 80 N. E. Rep. 193; In re Roche (1910), 126 N. Y. S. 766; Exempt Firemens' Ass'n v. Little Falls (1911), 132 N. Y. S. 798; Egbert Ashley Co. v. Fire Dept. (1911), 133 N. Y. S. 591.

[27a] Consol. Laws N. Y. 1909, Vol. 3, p. 1793 (Insurance Law, § 133).

into the treasury of the State."[28] The law is substantially the same in Illinois at the present time.[29] Two recent cases in Illinois have held that statutes requiring a pauper's relatives, when able, to support him, and cities to pay for the destruction of private property by mobs, are within the constitutional power of taxation, and are for public purposes.[30]

The Wisconsin law of 1852, requiring insurance agents to pay 2% of premiums received from fire insurance in Milwaukee to the Fire Department, for a fund for benefit of firemen, although challenged because "it assumes to take the property of one person and transfers it to another without due process of law," and violated the constitution that the "rule of taxation shall be uniform," was held by DIXON, C. J., to be valid.[31] The same policy still prevails in this state.[32]

In 1856, the legislature of Pennsylvania, imposed a license fee of $200 per year upon foreign insurance company agencies doing business in Philadelphia. In 1857 the law was changed so as to require all such agencies to pay 2% of their premiums for insurance done in Philadelphia to the Philadelphia Association for the Relief of Disabled Firemen, a private corporation, and to secure the payment by a bond with proper sureties. Action was brought upon the bond, and the court refused to enforce it, because it was "so extraordinary in character, of such doubtful constitutional validity, so dangerous in its tendency as a precedent, and unusual in the form of its enforcement" as to justify a court in refusing to enforce it. The court says the act "simply and arbitrarily imposes upon agents of foreign insurance companies the duty of paying two per cent of the premiums received by them to a private corporation in Philadelphia. Of course there is a good motive for this. The relief of disabled firemen is a purpose worthy of society . . . This is an association for a charitable purpose, it is true, but still it is strictly a private corporation. . . . The imposition upon the defendant of the duty of contributing to its support is therefore simply taking one man's property and giving it to another. It is depriving a man of his property without due process of law. . . . It is simply a decree that one class of men shall pay to others a share of the profits of

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[28] Firemen's Benev. Ass'n v. Lounsbury (1859), 21 Ill. 511, 74 Am. Dec. 115.

[29] See Hurd's Statutes (1897), p. 331; O'Connor v. Trustees Firemen's Pension Fund (1910), 155 Ill. App. 460, 247 Ill. 54, 93 N. E. 124.

[30] People v. Hill (1896), 163 Ill. 186; City of Chicago v. Cement Co. (1899), 178 Ill. 372.

[31] Fire Department v. Helfenstein (1862), 16 Wis. 136.

[32] Wis. Stat. Supp. 1899-1906, Ch. 89, § 1926. State v. Knowles (1911), 145 Wis. 523; Laws of Wis., Ch. 214, 1907, p. 243, §§ 959-46e.

their business. *True, the legislature might have imposed an equivalent tax on the business, and when paid into the public treasury, might have appropriated it to this association.*"[33] The case has met with some criticism. In *Weber* v. *Reinhard,*[34] Judge SHARSWOOD says of this case: "There are many things contained in the opinion in that case entirely aside from the point decided, and therefore mere *obiter dicta.* All that was determined was that an act of assembly which required all agencies for foreign insurance companies in the city of Philadelphia to pay two per cent of their gross premiums to an association for the relief of disabled firemen was not taxation at all; it was taking the property of A and giving it to B., whether for a charitable or any other mere private purpose it mattered not. *No doubt after money raised by taxation had reached the public treasury it may be appropriated by the legislature to charities or individuals.* It was admitted, indeed, that the tax in that case would be clearly constitutional, if it had been levied for and paid into the public treasury, and the idea that the court could pronounce the tax unconstitutional on the mere ground of injustice or inequality was expressly repudiated." To like effect is *Kelly* v. *Pittsburgh.*[35] Then in *Commonwealth* v. *Walton* (in 1897), it was expressly ruled that "a reasonable appropriation by the councils of a city to a corporation organized to create a fund to pension its members who are policemen is an appropriation to a strictly municipal use, and does not violate a constitutional provision that the "general assembly shall not authorize a city to appropriate money for, or loan its credit to, any corporation, association, institution or individual," and there is no merit in the objection that councils delegated the distribution of the sum appropriated to the Philadelphia Police Pension Fund Association, instead of distributing it themselves."[36] In 1895, the Pennsylvania legislature "imposed a tax upon the business done in this state by foreign fire insurance companies, of which one half the net amount was directed to be paid over by the state to the treasurers of the several cities in proportion to the amount of tax derived from each town."[37] The cities may appropriate the money so received to pensioning firemen if they so choose. The court says[38]: "The protection of the city from fire is a municipal function of the highest importance, and as said in *Commonwealth* v. *Walton,*[39] "a judiciously

[33] Philadelphia Ass'n v. Wood (1861), 39 Pa. St. 73.
[34] Weber v. Reinhard (1873), 73 Pa. St. 370, on 373.
[35] Kelly v. Pittsburgh (1877), 85 Pa. St. 170, on 178, Mr. Justice Gordon.
[36] Commonwealth v. Walton (1897), 182 Pa. St. 373, 61 Am. St. R. 713.
[37] P. A. 1895, June 28, 408. Stewart's Purdon's Digest, Vol. 2, p. 1985.
[38] Commonw. v. Barker (1905) 211 Pa. St. 610, 614, 61 Atl. 253.
[39] 182 Pa. St. 373.

administered pension fund is doubtless a potent agency in securing the services of the most faithful and efficient class of men," and "appropriation of money received from the state to a firemen's relief association" does not violate the constitution prohibiting appropriations for any corporation, institution or individual." To the same effect is the later case of *Firemen's Relief Ass'n* v. *Scranton.*[40] So in Pennsylvania the appropriation of public money derived from taxation, to pensioning firemen and policemen is a proper public purpose, and such funds can be used to supplement those derived from the contributions of members.[41]

In 1853, the legislature of Louisiana enacted that every agency of a foreign insurance company in New Orleans, shall be taxed $500 per annum, to be collected by the State tax commissioner, and immediately thereafter paid to the city treasurer to the credit of the fire department, to be divided between the fire companies as the majority of the firemen shall determine. The constitution provided that "taxation shall be equal and uniform throughout the state." *Held,* "We regard this annual imposition as a tax. It is levied by the State. It is collectible by the State tax collector. . . . One class of corporations is taxed an invariable sum for the benefit of another class. . . . A bounty is secured by the fire department by confiscating the money of the defendants, without providing that any service shall be rendered to the defendants by the fire department, and even if this could, for a moment, be regarded as an assessment for benefits conferred, its inequality is glaring."[42] The law was repealed before this decision was rendered. It of course was based upon the idea that the fire company was a *private* company. By an Act of 1902, the City of New Orleans is authorized to appropriate one per cent of all the revenues received by the city from licenses issued by it, to a fund for pensioning disabled and superannuated firemen. The validity of this act was not questioned in a late case involving its application.[43]

In *San Francisco* v. *Insurance Co.,* the Supreme Court of California held that a law requiring agents of foreign insurance companies to pay a certain percentage of premiums received from writing insurance within cities to the fire departments of such cities, violated the constitutional provision that the legislature should not impose a tax upon the inhabitants of a city for municipal

[40] Firemen's Relief Ass'n v. Scranton (1907), 217 Pa. St. 585.

[41] See Act 1893. P. A. 129, Stewart's Purdon's Digest, Vol. 3, p. 3546.

[42] State v. Merchants Ins. Co. (1857), 12 La. Ann. 802.

[43] State v. Bd. Trustees Firemen's Pension and Relief Fund (1906), 117 La. 1071.

purposes, but such taxes must be imposed by local authority alone.[44] After this decision the legislature passed an act directing the local authorities to provide by general tax upon the property of the local subdivision, a fund for pensioning firemen, which with amendments and supplements still remains in force.[45]

In 1895 the legislature also created an Exempt Firemen's Relief Fund, and directed that $12,000 per year be set aside from the municipal funds to pay pensions of $25 per month to exempt disabled firemen residing in any county or city in the state, whether they had ever rendered any service in said city or county or not. This law was held invalid as violating the constitutional provision forbidding the legislature "from making or authorizing a gift of public moneys to any person." The *exempt* firemen were such as had been firemen a few years somewhere, but now might be residing in an altogether different place from where the service had been rendered, and might under the provisions of the law congregate in any city, and claim and receive a pension from such *city,* without having served therein at all,[46] and the court points out the distinction between the provisions of this act and that of 1889. A police pension fund partly derived from moneys raised by taxation has existed since 1889 or earlier, and its provisions enforced in the courts without question.[47]

The Nebraska Supreme Court, following *San Francisco* v. *Insurance Co.*[48] above, held that a law requiring insurance companies to pay a percentage of their gross receipts to fire companies, was unconstitutional because the legislature was forbidden to impose a tax for *corporate* purposes,[49] but later cases hold a law authorizing the *cities* to impose such a tax for such a purpose is valid.[50] The Court says in the *Love* case that "A firemen's pension may be classified as part of his compensation for services rendered, or it may be said that it is paid to him for the purpose of stimulating all those engaged in like public duty to prevent and suppress the destruction of prop-

[44] City and County of San Francisco v. Liverpool and London Co. (1887), 74 Cal. 113, 5 Am. St. R. 425.

[45] Act 1889, p. 108, (March 11); Acts 1901, p. 101, 575; Acts 1903, p. 158; Acts 1905, p. 412; Baker v. Board of Fire Pension Fund Commrs. (1912), — Cal. App. —, 123 Pac. 344.

[46] Taylor v. Mott (1899), 123 Cal. 497.

[47] April 1, 1878 (p. 879); March 4, 1889 (p. 59). Pennie v. Reis (1889), 80 Cal. 266; Clarke v. Police Board (1898), 123 Cal. 24; Clarke v. Police Board (1900), 127 Cal. 550; Kavanagh v. Board of Police Commrs. (1901), 134 Cal. 50; Nicols v. Police Pension Fund (1905), 1 Cal. App. 494, 82 P. 556.

[48] San Francisco v. Ins. Co. (1887), 74 Cal. 113.

[49] State v. Wheeler (1891), 33 Neb. 563.

[50] German Am. F. Ins. Co. v. Minden (1897), 51 Neb. 870, 71 N. W. 995; Aachen and Munich Fire Ins. Co. v. Omaha (1904), 72 Neb. 518, 101 N. W. 3; State v. Love (1911), 89 Neb. 149, 131 N. W. 196, 33 L. R. A. (N. S.) 403, Ann Cas. 1912 A, 495.

erty and the loss of human life. . . . Within whichever class the pension may fall, public funds may be appropriated in conformity with legislative authority to pay the firemen, and the money is thereby expended for a public purpose."

In 1878 Minnesota imposed a tax upon fire insurance companies doing business in the state. By subsequent acts the amount of this tax derived from cities having fire departments is directed to be paid back to such cities for establishing a service and disability pension fund for firemen.[51] The supreme court has recently said: "The obvious intention of the laws here under consideration was to care for firemen who in the nature of their occupation are exposed to peculiarly dangerous hazards likely to result in death or permanent disability and are precluded from availing themselves of the ordinary means of commercial profit. It was fitting and just, and it is not here questioned, constitutional, that this provision should be made, and liberally construed."[52]

In North Dakota, a similar statute was enforced without question.[53] The Kentucky law of 1902, creating a pension fund for firemen, by a tax not exceeding one cent on each one hundred dollars of value of the taxable property in cities, has likewise been enforced by the courts without question.[54] The courts of New Jersey have also enforced a similar law enacted in 1902.[54a]

In *Henderson* v. *London &c Ins. Co.,* the supreme court of Indiana held the act of March 9, 1891, creating firemen's pension fund from a tax imposed on the premiums of foreign fire insurance companies for insurance written within the *county,* to pay pensions to disabled firemen in any *city* in the county, to be unconstitutional because firemen are not servants of the state, or county, but of the city, and because it is not a uniform and equal rate of taxation, and also applies only to a portion of a class of the citizens of the State.[55] Indiana now has a pension system for both firemen and policemen

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[51] Gen'l St. 1878, § 298, title 6, Ch. 34; Laws 1885, c. 187; 1887, c. 44; 1895, c. 73; 1897, c. 58; 1901, c. 188; 1903, c. 20. Rev. Laws Supp. 1909, §§ 1653 seq.

[52] Buckendorf v. Minn. Fire Dept. Rel. Ass'n. (1910), 112 Minn. 298, 127 N. W. 1133.

[53] Act June 7, 1904, 1905. Continental Hose Co. v. Fargo (1908), 17 N. D. 5, 114 N. W. 834.

[54] Carroll's Ky. St. 1909, ch. 89, § 2896a, subsec. 17. Board of Trustees of Firemens' Pension Fund v. McCrory (1909), 132 Ky. 89, 116 S. W. 326; Tyson v. Board of Trustees (1910), 139 Ky. 256, 129 S. W. 820; Schmidt v. Board of Trustees (1912), 146 Ky. 335, 142 S. W. 688.

[54a] Leffingwell v. Kiersted (1897), — N. J. —, 65 Atl. 1029; Compare Scott v. Jersey City, 68 N. J. L. 687, 54 Atl. 441.

[55] Henderson v. London Ins. Co. (1893), 135 Ind. 23, 41 Am. St. R. 410. Acts 1891, p. 415.

partly provided by taxation.[56] This has been enforced without question of its validity.[57]

As early as 1880, Ohio provided for a pension fund for firemen in cities of "second grade of first class" (Cleveland) by a tax on the premiums on foreign fire insurance companies. This was followed by similar acts for Cincinnati and Columbus. These and others were in 1902, superseded by a general law applicable to all cities, providing for a pension fund derived from a municipal tax of 3-10 of a mill, part of the Dow liquor license tax, fines on members, penalties for violating city ordinances, and contributions from members.[57a] The Cleveland, Columbus, and Cincinnati laws were enforced by the courts without questioning the propriety or validity of raising the funds by taxation, although the supreme court in the Columbus case intimated that the law might then be of uncertain validity because it violated the provision that "all laws of a general nature shall have uniform operation throughout the state."[58] Similar legislation exists with reference to policemen pension funds.[59]

A recent case in Alabama sums up the doctrine as to firemen's pensions thus: "The statutes of 1870, 1872, 1873, requiring all fire insurance companies taking premiums for fire insurance within the county of Montgomery, shall pay into the fire department of the City of Montgomery an annual sum of $200," to provide for disabled firemen and their families, "are not unconstitutional and void because they impose a specific tax for a private purpose; but the tax so imposed is one levied for public purposes, and is valid and enforceable."[60] The court adds:[61] "The exercise of the taxing power by legislature must become wanton and unjust, be so grossly perverted as to lose the character of legislative function, before the judiciary will feel themselves entitled to interfere on constitutional grounds. . . . The absence of all possible public interest in the purpose for which the funds are raised must be clear and palpable,—so clear and palpable as to be perceptible by every mind at first

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[56] 3 Burns Stat., §§ 8797, 8804.

[57] Hutchens v. Covert (1906), 39 Ind. App. 382.

[57a] See Apr. 17, 1880 (77 O. L. 309); Mar. 27, 1889 (86 O. L. 149, Cincinnati); Apr. 13, 1892 (89 O. L. 259, Columbus); Apr. 23, 1902, 95 O. L. 233; Page and Adams, Ohio Gen'l Code, §§ 4600 et seq.

[58] In re Price v. Farley (1901), 22 O. C. C. 48 (Cleveland); Karb v. State (1896), 54 O. S. 383 (Columbus); Rice v. State (1902), 48 O. L. Bull. 12 (Cincinnati); City of Cincinnati v. Steinkamp (1896), 54 O. S. 284.

[59] Page and Adams Ann. Ohio Gen'l Code, §§ 4616, et seq.

[60] Phoenix Assurance Co. v. Fire Dept. (1897), 117 Ala. 631.

[61] Ib. on pp. 647-649, quoting from Cooley on Taxation, pp. 103-106 (2d ed.), and Shenley v. City of Allegheny, 25 Pa. St. 128; Broadhead v. Milwaukee, 19 Wis. 624, 88 Am. D. 711, and Booth v. Woodbury, 32 Conn. 118.

blush. . . . If there be the least possibility that making the gift will be promotive in any degree of the public welfare, it becomes a question of policy and not of natural justice, and the determination of the legislature is conclusive. . . . The purposes for which this tax is imposed are not private or individual—nor is it a stimulus to the performance of a private or individual duty, as distinguished from a public duty; nor are the benefits the public are expected to derive, contingent or incidental."

In addition to these fourteen states,[62] from which cases relative to firemen's pensions supported in part by taxation, assuming or hold ing them to be valid, have been reviewed, the following states also have funds partly so provided, viz: Colorado, Iowa, Kansas, Massachusetts, New Hampshire, North Carolina, Oklahoma, Tennessee, Utah, Virginia, Washington.[63] And while I have not found decisions upholding them "the very fact that such cases are wanting is plenary evidence against any unconstitutionality of these laws."

The Supreme Court of South Carolina has recently held that the Act of 1906, establishing a firemen's pension fund was unconstitutional.[64] The act directed that 2 per cent of the premiums collected by fire insurance companies in the cities of the state having a fire department should be paid over "to firemen's associations" in such cities "for benefits, gratuities and pensions." This was held invalid because the tax was not uniform, nor for a public purpose, and because the Constitution expressly forbade granting pensions except for "military and naval service." The Court following cases from California, Indiana, Louisiana, Nebraska, and Pennsylvania, reviewed above,[65] says "where the benefits go to a Firemen's Benefit Association the public purpose seems to be lacking. Therefore we hold that the act cannot be sustained on the ground that it is a police regulation, the important characteristic, publicity of purpose being wanting. . . . In the present case the Legislature has gone further than attempting to raise money for fire departments, municipal organizations, in that it seeks to raise a fund by taxation for what seems to us merely a benevolent purpose. The money collected under the Act of 1906 is not for the use of the fire department but is to be paid to

[62] Ala., Cal., Ill., Ind., Ky., La., Minn., Neb., New Jersey, New York, No. Dak., Ohio, Pa., Wis..

[63] Colo. 1903, p. 447; Iowa, Apr. 7, 1909; Kans., 1895, ch. 363; Mass. 1898, 267; 1900, 246; N. H. Pub. St., 1901, 362; N. Car. Rev. St. 1905, § 4391; Okla. Comp. L. 1909, p. 383, § 975; Tenn. Laws 1909, ch. 408; Utah, Laws 1911, ch. 146; Va., Mar. 11, 1908, Am. Code 1910, ch. 181; Wash. Rem. and B. Ann. Code 1910, § 8074.

[64] Aetna Ins. Co. v. Jones (1907), 78 S. C. 445, 125 Am. St. R. 818.

[65] San Francisco v. Liverpool Ins. Co. (1887), 74 Cal. 113; Henderson v. London Ins. Co. (1893), 135 Ind. 23; State v. Merchants' Ins. Co. (1857), 12 La. Ann. 802; State v. Wheeler (1891), 33 Neb. 563; Philadelphia Ass'n v. Wood (1861), 39 Pa. St. 73.

certain firemen's asociations for benefits, gratuities, and pensions. These associations are incorporated under the law and their sole purpose is to take charge of the funds collected and disburse them in the manner provided for by the act." The Court itself acknowledges that this is dictum, because the case is clearly ruled by the express provision that no pension shall be granted "except for military or naval service". The reasoning however is based upon the private character of the private corporation that was to administer the fund, and does not deny that if it was paid to the municipality instead, it would then be for a public purpose; so far as it holds otherwise it stands alone among firemen's pension cases, and is also in conflict with New York, Illinois, Wisconsin, and Alabama cases above.[66]

As above stated many of the states have police pension funds derived partly from taxation, as in the case of firemen. Among these are California, Connecticut, Illinois, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Minnesota, New York, Ohio, New Jersey, Pennsylvania, Tennessee, Washington, and Wisconsin.[67] Many of these laws have been applied by the courts, assuming or deciding them to be constitutional.[68]

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[66] Trustees Exempt Firemen's Fund v. Roome (1883), 93 N. Y. 313; Fire Dept. v. Stanton (1899), 159 N. Y. 225; Firemen's Benev. Ass'n v. Lounsbury (1859), 21 Ill. 511; Fire Dept. v. Helfenstein (1862), 16 Wis. 136; Commn. v. Walton (1897), 182 Pa. St. 373; Commn. v. Barker (1905), 211 Pa. St. 610; Phoenix Assurance Co. v. Fire Dept. (1897), 117 Ala. 631.

[67] Cal. Laws 1878, 1889, 1891, 1897. St. 1905, c. 412; 5 Henning's Gen'l Law, p. 1062; Conn. Laws 1893, c. 115; Ill., Hurd 1908, p. 394, Am. 1911, p. 163; Ind. 3 Burns, § 8797, 1905, 236; Ia., Apr. 7, 1909; Ky., Laws 1904, 1912, p. 372; La., 1904, Act. 32, Am., 1910, p. 15; Mass. R. L. 1890, c. 108; 1892, p. 378; 1901, 377; Minn. Laws 1903, c. 159; Neb., Comp. St. Ann. 1911, § 917, July 2, 1909; New Jersey, Comp. St. 1208; N. Y. Laws 1885, 486; Pa., Brightly's Purdon, Vol. 2, p. 1428; Tenn. Laws 1909, c. 408; Wash., Rem. and Bal. Ann. Code 1910, §§ 8061-8080; Wis. Sess. L. 1911, p. 329.

[68] See Pennie v. Reis (1889), 80 Cal. 266, 132 U. S. 464; Clarke v. Police Board (1898), 123 Cal. 24; Clarke v. Police Board (1900), 127 Cal. 550; Kavanagh v. Board of Police (1901), 134 Cal. 50; Nicols v. Police Commrs. (1905), 1 Cal. App. 494; Burke v. Board Trustees (1906), — Cal. App. —, 87 Pac. 421; Edwards v. Sweigert (1911), 15 Cal. App. 503, 115 Pac. 256; Cohen v. Henderson (1912), — Cal. App. —, 124 Pac. 1037; Mott v. Scanlan (1912), — Cal. App. —, 125 Pac. 762; Hutchens v. Covert (1906), 39 Ind. App. 382; McAuliffe v. Board of Trustees (1909), — Ky. —, 115 S. W. 808; Head v. Jacobs (1912), — Ky. —, 150 S. W. 349; Eddy v. People (1905), 118 Ill. App. 138; Eddy v. People (1905), 120 Ill. App. 626, 218 Ill. 611; Moffatt v. O'Donnell — Mass. —, 102 N. E. 344; People v. Matsell (1883), 94 N. Y. 179; People v. Murray (1886), 102 N. Y. 468; People v. Partridge (1902), 172 N. Y. 305; People v. Coler (1903), 173 N. Y. 103; Matter of Friel v. McAdoo (1905), 101 App. D. 155, 181 N. Y. 558; Matter of Hickey (1907), 106 N. Y. S. 148; People v. Bingham (1908), 110 N. Y. S. 136, 193 N. Y. 610; Reynolds v. Bingham (1908), 110 N. Y. S. 520; Beal v. Bingham (1908), 112 N. Y. S. 465; Hodgins v. Bingham (1909), 196 N. Y. 123; People v. Bingham (1910), 198 N. Y. 274; Commonwealth v. Walton (1897), 182 Pa. St. 373; State v. Board of Trustees (1904), 121 Wis. 44; State v. Bd. of Trustees (1909), 138 Wis. 133, 20 L. R. A. (N. S.) 1175.

Although, as we have seen, the United States and many states, have granted pensions to veterans of the civil war, and nearly every one of the southern states have to the confederate soldiers, by laws enacted long after the service had been fully performed, and Maryland has to her ex-judges and Massachusetts to ex-soldiers and ex-employees, and such have usually been upheld as for a public purpose,[68a] yet in the case of policemen's and firemen's pensions the rule laid down in *Mead* v. *Acton*,[69] that some part of the service must be rendered after the law was enacted, otherwise the pension will be a mere gift or gratuity for a purely *private* purpose, and consequently invalid, has been followed in several cases. Such was the conceded rule in *State* v. *Love*, where the court says: "If no part of the service was rendered subsequent to the enactment of the law, the compensation would be a gratuity forbidden by the fundamental law of the State," and this was the rule applied to a teachers' pension case in New York.[70] In the *Love* case, however, it was also said: "But the relator continued in the service nine years after the law was enacted, and thereby earned a right to his pension under that act so long as it shall remain in force." The act directed cities to pension "all firemen of the paid department whenever such firemen *shall have* first served in such fire department for the period of 21 years," etc. The same rule has been applied even where the service after the law went into operation has been only a few months,[71] or years,[72] as well as longer periods of time.[73]

The reason for this view is stated in the *Love* case: "The fact

[68a] Maryland in 1904 enacted that all judges and ex-judges of all courts, who were or became 70 years old, and whether in office or not at the time the act took effect could be retired and paid $2,400 from the public treasury. Pub. Gen'l Laws, p. 759. Maryland grants pensions to teachers by special acts. See Laws 1902, c. 196; 1904, c. 584; Laws 1912.

[69] Mead v. Acton (1885), 139 Mass. 341. This rule in this case is confined to very narrow limits by the later decisions. See Opinions of Justices (1900), 175 Mass. 599; (1904), 186 Mass. 603; (1906), 190 Mass. 611; (1912), 211 Mass. 608, 98 N. E. 338.

[70] State v. Love (1911), 89 Neb. 149, 131 N. W. 196, Ann. Cas. 1912 C,, p. 542; Matter of Mahon v. Board of Education (1902), 171 N. Y. 263, 89 Am. St. R. 810; People v. Partridge (1902), 172 N. Y. 305; Edwards v. Sweigert (1911), 15 Cal. App. 503, 115 Pac. 256; Clarke v. Police Bd. (1900), 127 Cal. 550.

[71] Hutchens v. Covert (1906), 39 Ind. App. 382; Moore v. Board of Education (1907), 106 N. Y. S. 983. See Trustees of Exempt Firemen v. Roome (1883), 93 N. Y. 313, supra.

[72] O'Connor v. Trustees (1910), 155 Ill. App. 460, 247 Ill. 54.

[73] See Pennie v. Reis (1889), 80 Cal. 266; Nicols v. Police Pension Fund Commn. (1905), 1 Cal. App. 494; Cohen v. Henderson (1912), — Cal. App. —, 124 Pac. 1037; Kavanagh v. Board of Police (1901), 134 Cal. 50; Eddy v. People (1905), 118 Ill. App. 138; State v. Bd. Trustees (1906), 117 La. 1071; Hodgins v. Bingham (1909), 196 N. Y. 123; State v. Board Trustees (1904), 121 Wis. 44; State v. Knowles (1911), 145 Wis. 523; Buckendorf v. Minn. Fire Dept. (1910), 112 Minn. 298; Tyson v. Bd. Trustees (1910), 139 Ky. 256, 129 S. W. 820; Schmidt v. Board Trustees (1912), 146 Ky. 335, 142 S. W. 688.

that some firemen earned their pensions by serving a comparatively short time subsequent to 1895, whereas others were compelled to continue in the service for a greater length of time does not make the legislation void. The constitutional limitations do not apply to such conditions. The legislature is not restrained from paying unequal compensation for official services so long as its laws with regard thereto are general."[74]

In conflict with the foregoing doctrines relating to service pensions for firemen and policemen is the case of *State* v. *Ziegenhein*.[75] The constitution provided that "the general assembly shall have no power to authorize any city to grant public money in aid of or to any individual, association or corporation whatever." In 1895 the legislature enacted that "any person who shall serve as a policeman of St. Louis for 20 years may be retired from active service on half pay for the remainder of his life." The relator had served 20 years, but less than 2 years after the act went into operation. The court ruled that the act violated the constitutional provision; that it could not be upheld as a payment in compensation for services rendered before retirement; and even if constitutional, since the words are "*shall serve for 20 years* or more," he would have to serve 20 years after the law went into effect. The court says: "It is conceded that the legislature cannot, under the Constitution authorize a city to give money out of its treasury simply as a gratuity in recognition of *past* services rendered by public officers. It is claimed that the provision for retirement on half pay after 20 years service is part of the contract of employment of those appointed since that act took effect, and constitutes a portion of the *compensation* for the services rendered *before* retirement. . . . Eighteen of the 20 years of his service were before there was any provision for such alleged compensation, payable after retirement. If this be regarded as an additional salary *for twenty years of faithful and efficient work* in the police department the relator would certainly be receiving, in part, at least, a gratuity for what he had done before the act went into effect, and before any such compensation, as is now claimed, was provided. . . . The policeman who remains on the force for 20 years less 5 days, and the one who retains his office for the full term, are paid *during active service*, precisely the same sum, if they are of like rank. This must be deemed proper compensation for

[74] State v. Love (1911), 89 Neb. 149, 131 N. W. 196, Ann. Cas. 1912 C. 542.

[75] State v. Ziegenhein (1898), 144 Mo. 283, 66 Am. St. R. 420. The constitutional provision above given had a proviso that it should not be construed so as to prevent "the creation, maintenance and management of a fund for pensioning crippled and disabled firemen." The court did not seem to rely on the rule "expressio unius, exclusio alterius," as it might have done. 1 Mo. Ann. Statutes (1906), p. 195.

the time *actually devoted to the public service.* Nothing is withheld from the person who may serve 20 years, to be paid to him after he may be placed upon the retired list, and after retirement he is no longer subject to police duty and cannot be earning a salary. If he has been paid the same as other officers of shorter terms, for the time devoted to public duties anything in addition thereto can only be regarded as a mere gratuity. The argument of the relator would establish the proposition that it is a mere matter of legislative discretion to give a salary after retirement to all officers of the State and its municipalities, provided they shall be elected or appointed after the passage of an act to that effect." The court seems to admit that if something had been withheld from the salary during service the act might have been valid; so too it apparently admits that it would be valid if it applied to those who continued in the service for 20 years after the law took effect. The cogency of the court's reasoning against the *policy* of granting pensions is manifest, —but as to the *legislative power* to do so is not so clear, and upon that point stands alone upon the same facts. The court relies upon *Mead* v. *Acton,*[76] but in view of the later Massachusetts decisions, misapplies the doctrine of that case.

From the foregoing it is clear that the overwhelming weight of authority is that the grant of pensions to those who are in the service, as firemen or policemen, at the time the act takes effect to be paid after the service terminates, out of public funds raised by taxation, is valid as for a *public* purpose,—there being only two cases to the contrary.[77] There are no teachers' pension cases to the contrary. New York enforces her teachers' pension law, except when it undertakes to give a pension to those who had retired before the law went into operation.[78] There seems to be no other teachers' pension case on this point. In view of the large number of states having teachers' pension funds derived from taxation this indicates they are considered valid.

(b) Do such grants or payments violate the constitutional provisions that "property shall not be taken without due process of law," nor shall the states "deny to any person within its jurisdiction the equal protection of the laws," or "government is instituted for the equal benefit of all the people"? As has been said above taxation for a private purpose is confiscation, and deprives one of his prop-

[76] Mead v. Acton (1885), 139 Mass. 341; Opinions of Justices (1900), 175 Mass. 599; (1912), 211 Mass. 608.

[77] Aetna Ins. Co. v. Jones (1907), 78 S. C. 445, 125 Am. St. R. 818; State v. Ziegenhein (1898), 144 Mo. 283, 66 Am. St. R. 420.

[78] Moore v. Board of Ed. (1907), 106 N. Y. S. 983; Matter of Mahon v. Board of Education (1902) 171 N. Y. 263, 89 Am. St. R. 810.

erty without due process of law.[79] It is sometimes said that the taxpayer must consent to the tax, or he must be benefited by it in order to make it valid, under these provisions. Of course the consent here is not individual consent, but political consent through representatives acting within their lawful authority.[80] So, too, in the case of *benefit,* unless the tax is an assessment for a special purpose, the benefit need not be specific and individual, but only that *political benefit* which arises from "promoting the general objects of government."[81] There can be no doubt but that if teachers' pensions will in any substantial degree promote the public welfare, they are within the general objects the government has in establishing and regulating an educational system, and appropriating money raised by general taxation thereto. Taxation therefor deprives no one of his property without due process of law, nor violates any right or equity, any more than taxation to pay salaries, or for any need of the government, does, because the payment is made to private parties and becomes their private property.[82] Whether compulsory contributions by teachers to such fund is special taxation or not, and requires a showing of special benefits to be derived by such teacher in order to be "due process," or secure "equality" is considered below in the discussion of Section VIII.

(c) Does the proposed act grant or loan the credit of the State "to or in aid of any person, association or corporation public or private."[83] This section II, says: "there is hereby appropriated out of the general fund in the state treasury such additional sums as may be necessary to pay the retirement salaries and expenses herein provided for. The auditor general shall add to and incorporate in the State tax every year a sufficient amount to reimburse the general fund for the amounts appropriated by this act." The provisions here as to appropriation and levying the tax sufficiently conform to the practice under the constitution upon those matters.[84]

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[79] Sharpless v. Mayor (1853) 21 Pa. St. 147; People v. Salem Twp. (1870), 20 Mich. 452; Loan Ass'n v. Topeka (1874), 87 U. S. 655; Bay City v. State Treasurer (1871), 23 Mich. 499, 502.

[80] Gray, Limitation on Taxing Powers, p. 131.

[81] Cooley, Taxation, 2d ed., p. 24; Boyd, Workmen's Compensation, §§ 89, 90; Gray, Limitations of Taxing Power, pp. 131, 132.

[82] Borgnis v. Falk Co. (1911), 147 Wis. 327, 133 N. W. 209. A statute requiring municipalities to levy a tax to pay all workmen for injuries received while in the employ of the public, does not deprive taxpayers of their property without due process of law. This is true although the municipality would not be liable at all except for the statute.

[83] Art. X, § 12, Const. Mich. 1909.

[84] Art. X, § 12, also provides: "No money shall be paid out of the state treasury except in pursuance of appropriations made by law." Art. X, § 6, provides that: "Every law which imposes, continues or revives a tax shall state the tax and the objects to which it shall be applied." See People v. Mahoney (1865), 13 Mich. 481, 498; Westing-

The typical case of loaning the credit of the State to or in aid of any person forbidden by the constitution is one in aid of some private business, or one under private control, such as *People* v. *Salem,*[85] or *Taylor* v. *Commissioners,*[86] and the numerous other cases referred to in the previous article on what is not a public purpose.[87] "Loaning credit" means primarily supporting the credit of a person by guaranties, indorsements, and contracts, but it also is usually held to include donations which involve creating a debt for the benefit of such person.[88] However the appropriation of the revenue, before its receipt, and its replenishing by taxation, if the purpose is a proper public one is not loaning the credit of the State.[89] In *Trustees* v. *Roome,* the Court by FINCH, J., ruled that the appropriation of the "money of the state," for firemen's pensions was not giving or loaning it "to or in aid of any association, corporation or private undertaking," as is fully set forth above, although there was an association of firemen to whom it was given.[90] That the case of *Matter of Mahon* v. *Board of Education,*[91] holding that the giving of pensions to teachers *who had been retired before* the pension law went into operation, violated the constitutional provision against granting *extra* compensation, is not in conflict with the *Roome* case is made clear by the fact that it is neither overruled nor criticised, that the same constitutional provision was then in effect, and subsequent cases in New York have uniformly enforced the pension laws which grant pensions from public funds to those who have been in the service after the pension law went into operation, and that the court expressly approved[92] "the able opinion delivered by the learned court" below, which made this distinction as follows:[93] "Pension

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hausen v. People (1880), 44 Mich. 265; Trowbridge v. Detroit (1894), 99 Mich. 443; Union Trust Co. v. Wayne Probate Judge (1901), 125 Mich. 487.

[85] People v. Salem (1870), 20 Mich. 452.

[86] Taylor v. Commissioners (1872), 23 O. S. 22.

[87] Mich. L. Rev., May, 1913, pp. 462, 472.

[88] Green v. Dyersburg (1879), 10 Fed. Cas. No. 5756, p. 1099 on 1103; Jarrott v. Moberly (1878), 13 Fed. Cas. No. 7223, p. 366 on 368; Gibson v. Mason (1869), 5 Nev. 283, 300. Compare Johnson City v. Railroad (1897), 100 Tenn. 138.

[89] Stein v. Morrison (1904), 9 Idaho 426, 75 Pac. 246; French v. Millville (1901), 66 N. J. L. 392, 67 N. J. L. 349.

[90] 93 N. Y. 313, on 325; Supra p. 33; See also Boehm v. Hertz (1899), 182 Ill. 154, 48 L. R. A. 575, 54 N. E. 973; Bullock v. Billheimer (1911), — Ind. —, 94 N. E. 763; Hanley v. Sims (1911), — Ind. —, 93 N. E. 228, 94 N. E. 401; Hager v. Kentucky Children's Home (1904), 119 Ky. 235, 67 L. R. A. 815, 83 S. W. 605.

[91] Matter of Mahon v. Board of Education (1902), 171 N. Y. 263; People v. Partridge (1902), 172 N. Y. 305; Taylor v. Mott (1899), 123 Cal. 497.

[92] See 171 N. Y. 263, on pp. 265, 267.

[93] Matter of Mahon v. Board of Ed. (1902), 68 App. Div. 154; Moore v. Board of Education (1907), 106 N. Y. S. 983, 195 N. Y. 614; Hodgins v. Bingham (1909), 196 N. Y. 123.

laws, so-called, are now quite common, both in State and Federal legislation. These annuities, after the expiration of the period of active service, are not gratuities, but are in the nature of compensation for the services previously rendered for which full and adequate compensation was not received at the time of the rendition of the services. In other words, it is in effect pay withheld to induce long-continued and faithful service. Such statutes are designed to benefit the public service in two ways: *First,* by encouraging competent and faithful employees to remain in the service, and refrain from embarking in other vocations; and *second,* by retiring from the public service those who, by devoting their best energies for a long period of years to the performance of duties in a public office or employment have by reason thereof or of advanced age, become incapacitated from performing the duties as well as they might be performed by others of more youthful or in greater physical or mental vigor. Provision is thus made for the partial support of such teachers when their retirement without such provision was deemed inequitable, and but for such provision would not be enforced. These and other considerations will sustain such legislation from successful attack where the legislature has limited the application of the law to those who are in the public service or employ at the time of the enactment. As to those, however, who have passed out of the public service at a time when no such obligation had been assumed toward them, retroactive legislation of this character becomes obnoxious to the constitution. In such case the annuity becomes a mere gratuity, the giving of which is prohibited by § 10 of Art. 8 of the constitution" ("no city shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation").

So also in the *Love* case[94] above referred to where the statute required cities to pension firemen after more than 21 years' service, a fireman who had served more than 21 years, only 9 years of which were after the act went into operation, the court says: "We do not understand that by enforcing the provisions of the statute the credit of the state is given or loaned in aid of any individual or corporation. Section 3, Art. XII of the constitution ("the credit of the state shall never be given or loaned in aid of any individual, association or corporation") was intended to prevent the State from extending its credit to private enterprises. *Oxnard Beet Sugar Co.* v. *State,* 73 Neb. 66."

[94] State ex rel Haberlan v. Love (1911), 89 Neb. 149, on 153. To same effect is Commn. v. Walton (1897), 182 Pa. St. 373.

Inasmuch as the constitutions of 39 states[95] have such a provision the absence of decisions holding pension laws in conflict therewith indicates the concensus of opinion that such laws do not loan the credit of the State to individuals. As will be shown below the Board created by the statute to administer the retirement fund is not an "association or corporation, public or private," within the meaning of such provision.

(d) Whether the pension to be paid is *extra compensation,* contrary to constitutional provisions is considered below.

The proposed act also satisfies the constitutional requirement that every act levying a tax shall specify the purpose for which it is levied.[95a]

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*(To be continued.)*

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[95] See Stimson, Fed. and State Constitutions, § 326.

[95a] Art. X, § 6, Const. Mich.; Tyson v. Board of Trustees (1910), 139 Ky. 256; Westinghausen v. People (1880), 44 Mich. 266; Trowbridge v. City of Detroit (1894), 99 Mich. 443; Union Trust Co. v. Probate Judge (1901), 125 Mich. 487.